

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PNC FINANCIAL SERVICES GROUP,
INC.; and PNC BANK,

NO. CV-10-34-EFS

Plaintiffs,

vs.

PRIME LENDING, INC.; RONALD D. THOMAS; and KALE SALMANS.

ORDER GRANTING DEFENDANTS'
MOTIONS FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S RULE 56(d) MOTION

Defendants.

A hearing occurred in the above-captioned matter on February 29, 2012, in Richland, Washington. Matthew Daley, Thomas Cochran, and Meredith Wilkes appeared on behalf of Plaintiffs PNC Financial Services Group, Inc. and PNC Bank (collectively, "PNC"); James E. Breitenbucher and Wesley Morrison, Jr. appeared on behalf of Defendants Prime Lending, Inc. ("Prime Lending") and Kale Salmans (collectively, "Prime Lending Defendants"); and Patrick Kirby appeared on behalf of Defendant Ronald D. Thomas. Before the Court were Mr. Thomas' Motion for Partial Summary Judgment, ECF No. [203](#), the Prime Lending Defendants' Motion for Partial Summary Judgment, ECF No. [204](#), and PNC's Motion for Leave to Conduct Discovery and for a Continuance, ECF No. [217](#). At the hearing, the Court granted Defendants' partial summary judgment motions and denied PNC's Rule 56(d) motion. This Order serves to memorialize and supplement the

1 Court's oral rulings.

2 **I. Background¹**

3 Plaintiffs PNC Bank, National Association, and PNC Financial
4 Services Group, Inc. are both Pennsylvania corporations with their
5 headquarters based in Pittsburgh, Pennsylvania. Plaintiff PNC Bank,
6 National Association is the successor-in-interest to National City
7 Corporation (hereinafter "National City"), and Plaintiff PNC Financial
8 Services Group, Inc. is the successor-in-interest to National City Bank,
9 N.A.

10 Defendant Ronald Thomas began working for National City as the
11 company's Spokane Market Manager in April 2002. On November 19, 2007,
12 Mr. Thomas entered into a Restricted Stock Agreement (RSA) with National
13

14 ¹ In connection with Defendants' motions, the parties submitted
15 Joint Statements of Uncontroverted Facts. ECF Nos. [240](#) & [241](#). The Court
16 treats these facts as established consistent with Federal Rule of Civil
17 Procedure 56(d), and sets these forth in this background section without
18 reference to an ECF number. Disputed facts are supported by a citation
19 to the record. When considering these motions and drafting this
20 background section, the Court viewed all evidence and drew all
21 justifiable inferences therefrom in PNC's favor and did not weigh the
22 evidence, assess credibility, or accept assertions made by Defendants
23 that were flatly contradicted by the record. See *Scott v. Harris*, 550
24 U.S. 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
25 (1986).

1 City, which granted him shares of National City stock in exchange for
2 certain promises. Specifically, paragraph 12 of the RSA dictated that
3 Mr. Thomas 1) would not solicit or divert customers of National City
4 while in the company's employ or for one year thereafter, 2) would not
5 solicit or induce employees of National City to leave their employment
6 while in the company's employ or for three years thereafter, and 3) would
7 keep National City's confidential and proprietary trade secret
8 information confidential both during and after his employment with the
9 company. The RSA also incorporated by reference the National City
10 Corporation Long-Term Cash and Equity Incentive Plan, which had been in
11 effect since January 1, 2005. The RSA contained a choice-of-law clause
12 stating that it would be construed and governed in accordance with Ohio
13 law.

14 On October 24, 2008, National City entered into a merger agreement
15 with PNC Financial Services Group, Inc. The agreement became effective
16 on December 31, 2008, with PNC Financial Services remaining as the
17 surviving corporation. On November 6, 2009, National City Bank, N.A.
18 entered into a merger agreement with PNC Bank, National Association, with
19 PNC Bank, National Association as the surviving corporation. Both
20 mergers were organized under Pennsylvania and Delaware law. Under the
21 terms of the mergers, PNC is the successor-in-interest to the property
22 rights owned by National City Corporation and National City Bank, N.A.

23 When PNC acquired National City, it wrought a number of significant
24 changes to National City's loan origination policies. PNC centralized
25 National City's loan underwriting and processing, imposed a cap on loan
26 officer commissions from "internal" refinances of loans that had

1 originated with National City, and prohibited branch managers from
2 originating loans. These changes caused National City loan officers to
3 worry that the company's loan processing efficiency would suffer, and
4 caused all National City employees to be concerned that their income
5 would decline. This concern was particularly acute among branch
6 managers, because National City's branch managers had only earned a small
7 fraction of their income from management, the majority coming from loan
8 origination commissions.

9 Prime Lending is a mortgage lender based in Dallas, Texas. In the
10 spring of 2009, Prime Lending moved to enter the mortgage lending market
11 in Spokane. Around that time, Mr. Thomas met with Prime Lending to
12 discuss employment and agreed to join the company. Mr. Thomas allegedly
13 began recruiting PNC employees for Prime Lending, arranging for almost
14 all of PNC's Spokane employees to resign on July 14, 2009, and take jobs
15 at Prime Lending in what Plaintiffs describe as a "raids." This mass
16 resignation effectively shut down National City's operations in the
17 Spokane area.

18 For several weeks after the mass resignation, Mr. Thomas was in the
19 employ of both companies, allegedly feigning both surprise at the
20 employees' *en masse* departure and hope that he could rebuild PNC's
21 Spokane branch. Mr. Thomas was part owner of the LLC that owned PNC's
22 office space, and allegedly arranged to have PNC move out of its Spokane
23 office and be replaced by Prime Lending. Mr. Thomas also allegedly
24 forwarded numerous customer inquiries from PNC to his personal email
25 address and took a computer file containing PNC's proprietary data on
26 over 2,300 customers. On August 6, 2009, Mr. Thomas resigned from PNC.

1 Mr. Thomas allegedly continued to recruit employees from other PNC
2 branches while at Prime Lending.

3 PNC filed its Complaint in the Northern District of Ohio on
4 September 16, 2009, alleging state and federal claims against Mr. Thomas
5 and Prime Lending. On February 5, 2010, the case was transferred to this
6 Court. ECF No. [21](#). On July 19, 2010, the Court granted Defendants'
7 motion to dismiss several of PNC's claims and granted PNC leave to amend
8 its complaint. ECF No. [141](#). On July 20, 2010, the Court denied PNC's
9 motion for a preliminary injunction. ECF No. [142](#). On October 6, 2010,
10 after the Court granted PNC's second motion for leave to amend, PNC filed
11 its First Amended Complaint. ECF No. [181](#).

12 The First Amended Complaint asserts claims for breach of contract
13 and breach of the duty of loyalty against Mr. Thomas, and claims for
14 misappropriation of trade secrets, tortious interference with contract,
15 unfair competition, and civil conspiracy against Mr. Thomas, Prime
16 Lending, and Kale Salmans, Prime Lending's Regional Senior Vice President
17 for the northwest region. Mr. Thomas now moves for partial summary
18 judgment on PNC's breach of contract and tortious interference with
19 contract claims; the Prime Lending Defendants move for partial summary
20 judgment on PNC's tortious interference with contract claim only. PNC
21 opposes both motions and filed a motion for leave to conduct additional
22 discovery pursuant to Federal Rule of Civil Procedure 56(d).

23 **II. Discussion**

24 **A. Summary Judgment Standard**

25 Summary judgment is appropriate if "the movant shows that there is
26 no genuine dispute as to any material fact and the movant is entitled to

1 judgment as a matter of law." Fed. R. Civ. P. 56(a). Once a party has
 2 moved for summary judgment, the opposing party must point to specific
 3 facts establishing that there is a genuine issue for trial. *Celotex*
 4 *Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails
 5 to make such a showing for any of the elements essential to its case for
 6 which it bears the burden of proof, the trial court should grant the
 7 summary judgment motion. *Id.* at 322. "When the moving party has carried
 8 its burden of [showing that it is entitled to judgment as a matter of
 9 law], its opponent must do more than show that there is some metaphysical
 10 doubt as to material facts. In the language of [Rule 56], the nonmoving
 11 party must come forward with 'specific facts showing that there is a
 12 genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio*
 13 *Corp.*, 475 U.S. 574, 586-87 (1986) (internal citation omitted) (emphasis
 14 in original).

15 When considering a motion for summary judgment, the Court does not
 16 weigh the evidence or assess credibility; instead, "the evidence of the
 17 non-movant is to be believed, and all justifiable inferences are to be
 18 drawn in his favor." *Anderson*, 477 U.S. at 255. This does not mean that
 19 the Court accepts as true assertions made by the non-moving party that
 20 are flatly contradicted by the record. See *Scott*, 550 U.S. at 380.

21 **B. Breach of Contract Claim**

22 PNC asserts that Mr. Thomas violated the non-compete, non-
 23 solicitation, and trade secret confidentiality provisions of the RSA by
 24 orchestrating Prime Lending's "raid" of PNC's Spokane office. In his
 25 summary judgment materials, Mr. Thomas argues that the covenants in the
 26 RSA, which were made between him and National City, are not assignable

1 to PNC, and thus PNC has no right to enforce them against him.

2 As a preliminary matter, the Court must determine what law to apply
3 to this issue. As noted in the Court's Order Denying Plaintiffs' Motion
4 for Preliminary Injunction, ECF No. [142](#) at 9, Ohio law applies because
5 the parties reasonably chose Ohio law to govern the RSA, and when there
6 is a change in corporate ownership, assignment of a non-compete covenant
7 must be legal under the law that governs each individual contract
8 regardless of which state's law applies to the merger. See *Fitness*
9 *Experience, Inc. v. TFC Fitness Equip., Inc.*, 355 F. Supp. 2d 877, 887
10 (N.D. Ohio 2004) (applying Ohio law in assignability analysis following
11 asset transfer from one corporation to another); *Rogers v. Runfola &*
12 *Assocs., Inc.*, 565 N.E.2d 540, 543 (Ohio 1991) (non-compete agreement
13 must be assignable to remain valid after structural change from sole
14 proprietorship to corporation).

15 Under Ohio law, a non-compete covenant may be assignable even if the
16 contract does not so specify. *Blakeman's Valley Office Equip., Inc. v.*
17 *Bierdeman*, 786 N.E.2d 914, 917 (Ohio App. 2003). Conversely, even a
18 contract that includes an explicit assignment clause may not be
19 assignable. See *Murray v. Accounting Ctr. & Tax Servs., Inc.*, 898 N.E.2d
20 89, 92-93 (Ohio App. 2008). Whether a non-compete clause is assignable
21 depends on 1) whether the contract's language indicates that the parties
22 intended for the non-compete covenant to be assignable; 2) whether
23 assignment is necessary to protect the employer's goodwill; and 3)
24 whether assignment would create additional burdens on the employee
25 because of the change in ownership. *Fitness Experience*, 355 F. Supp. 2d
26 at 889; *Rogers*, 565 N.E.2d at 543; *Blakeman's Valley*, 786 N.E.2d at 918.

1 Ohio courts view non-compete clauses skeptically and construe them
2 against the party seeking enforcement. *Fitness Experience*, 355 F. Supp.
3 2d at 888-89; *Lake Land Emp't Group of Akron, LLC v. Columber*, 804 N.E.2d
4 27, 30 (Ohio 2004).

5 PNC argues that a recent decision of the Court of Appeals of Ohio,
6 *Acordia of Ohio, LLC v. Fishel*, No. C-100071, 2010 WL 5275169 (Ohio App.
7 Dec. 17, 2010), review granted, 945 N.E.2d 522 (Ohio 2011), modifies the
8 analysis set forth above, and has filed a motion asking the Court to hold
9 Defendants' motions in abeyance until the Supreme Court of Ohio issues
10 its ruling. In the alternative, PNC asks the Court to permit it to
11 conduct five additional depositions with regard to the three
12 assignability factors.

13 **i. Acordia of Ohio, LLC v. Fishel**

14 *Acordia* is a suit by an Ohio insurance agency against four former
15 employees and a competitor, alleging violations of non-compete agreements
16 and misappropriation of trade secrets stemming from the employees'
17 defection to the competitor company. *Acordia*, 2010 WL 5275169 at *1.
18 All of the former employees signed non-compete agreements when they began
19 their employment with Acordia but, as here, Acordia is the product of
20 various corporate mergers, and each of the employees' non-compete
21 agreements were signed with Acordia's predecessors. *Id.* The court of
22 appeals' holding in *Acordia* turned on whether the two-year limitation in
23 the non-compete agreements began to run at the time of Acordia's prior
24 merger or at the time of the employees' resignation. *Id.* at 3. But
25 before analyzing the time limitation in the non-compete agreements, the
26 court did not apply the three assignability factors set forth above to

1 determine whether Acordia could enforce agreements. *Id.* Instead, noting
2 that under Ohio's merger statute, R.C. 1701.82, a surviving entity
3 assumes all the property interests of each constituent entity, the
4 *Acordia* court stated that "Ohio law provides that noncompete agreements
5 transfer by law in a merger." *Id.*

6 PNC argues that the Court should hold Defendants' motions in
7 abeyance pending the decision of the Supreme Court of Ohio because, if
8 affirmed, *Acordia's* holding would foreclose Defendants' position as a
9 matter of law. However, even if the appellate court's statement
10 regarding the automatic transfer of non-compete agreements is adopted by
11 Ohio's supreme court, it will not dispose of this case because the court
12 applied *Ohio's* merger statute to the case before it; while the Court
13 applies Ohio law to the construction of the RSA agreement, the mergers
14 between National City and PNC were governed by Pennsylvania and Delaware
15 law, and this critical aspect of *Acordia's* assignability determination
16 is thus absent from this case. See *id.* (citing R.C. 1701.82(A)(3)).

17 Accordingly, PNC's argument that the forthcoming decision in *Acordia*
18 may preclude Defendants' motions is without merit, and PNC's request to
19 continue Defendants' motions is denied in this regard. And because PNC's
20 Rule 56(d) motion, ECF No. [217](#), does not convince the Court that it
21 should allow PNC additional time in order to obtain additional facts
22 essential to justify its opposition to Defendants' motions, PNC's motion
23 is denied in toto.

24 **ii. Assignability Analysis**

25 Relying heavily on the Court's ruling denying PNC's motion for a
26 preliminary injunction, Mr. Thomas argues that all three assignability

1 factors weigh against finding that the covenants in the RSA agreement
2 were assignable. However, findings made with regard to a court's
3 preliminary injunction ruling do not become the "law of the case" and do
4 not bind the court in future proceedings. See *Sierra On-Line, Inc. v.*
5 *Phoeniz Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984). And because
6 the Court was applying a different standard when evaluating Plaintiffs'
7 motion for a preliminary injunction, the Court analyzes the assignability
8 factors anew.

9 Mr. Thomas' motion depends on the three assignability factors set
10 forth above: 1) whether the contract's language indicates that the
11 parties intended for the non-compete covenant to be assignable; 2)
12 whether assignment is necessary to protect the employer's goodwill; and
13 3) whether assignment would create additional burdens on the employee
14 because of the change in ownership. See *Fitness Experience*, 355 F. Supp.
15 2d at 889. The assignability of a particular contract is a question of
16 law properly resolved by the court. *Id.* at 887 (citing *Managed Health*
17 *Care Assoc. v. Kethan*, 209 F.3d 923, 926 (6th Cir. 2000)).

18 The language of the RSA does not evince an intent to make the
19 covenants assignable. As noted in the Court's preliminary injunction
20 ruling, the only clause in the RSA that mentions assignability or the
21 effects of a future merger is paragraph 2, which dictates that "[a]ny
22 additional shares of equity securities which [Mr. Thomas] may become
23 entitled to receive by virtue of . . . a merger . . . shall be subject
24 to the restrictions set forth herein." ECF No. 52-3 at 1. By its
25 express terms, this language only applies to after-acquired shares of
26 equity securities and has no bearing on the non-compete, non-

1 solicitation, and trade secret confidentiality covenants contained in
2 paragraph 12. And though the RSA incorporates by reference the National
3 City Corporation Long-Term Cash and Equity Incentive Plan, which does
4 contain language that binds National City's successors-in-interest, that
5 Plan neither contains nor refers to any of the covenants now at issue;
6 the mere fact that a non-assignable contract incorporates an assignable
7 contract does not render both assignable. Finally, PNC's assertion that
8 this language is ambiguous, and thus creates a factual issue for trial,
9 is unfounded; the Court's previous reference to the RSA's "ambiguity,"
10 ECF No. [142](#) at 10, was made in application of a different legal standard,
11 and would not bind the Court regardless. The language of the RSA runs
12 counter to a finding of assignability.

13 The second factor also disfavors assignability. Whether a non-
14 compete agreement is necessary to protect an employer's goodwill depends
15 on the nature of the business and the particular employee's position.
16 *Fitness Experience*, 355 F. Supp. 2d at 890. While Mr. Thomas was a high-
17 level, successful employee at National City, National City was not a
18 business "which perform[ed] unique services and [was] highly dependent
19 on a few key clients." *Id.* Rather, National City was a mortgage lender
20 that offered a fungible service to the general public. And more
21 fundamentally, a finding of assignability is not necessary to protect
22 National City's goodwill because it was subsumed by the merger and its
23 brand discontinued.

24 The third factor, whether assignment would create additional burdens
25 on the employee because of the change in ownership, also strongly
26 disfavors assignment. To find that the RSA's covenants became assigned

1 to PNC as a result of the merger would at the very least mean that Mr.
2 Thomas would be prohibited from competing against a company whose
3 clientele and scope of operations he did not know and with which he had
4 never signed an agreement. This would create severe additional burdens
5 on Mr. Thomas because of the change in ownership. As noted on the
6 record, the facts of this case clearly demonstrate why an assignability
7 analysis is necessary to protect employees from undue burdens created by
8 changes in the ownership of their employers.

9 Taken together, the three assignability factors all weigh in favor
10 of a finding of non-assignability, and the Court grants Mr. Thomas'
11 motion in this regard.

12 **C. Tortious Interference with Contract Claim**

13 Both Mr. Thomas and the Prime Defendants moved to dismiss PNC's
14 claim for tortious interference with contract. ECF Nos. [203](#) & [204](#). PNC
15 bases this claim on Mr. Thomas' and PNC's alleged interference with the
16 non-compete, non-solicitation, and trade secret confidentiality covenants
17 in the agreements of the PNC employees that resigned on July 14, 2009.
18 As such, the parties appear to agree that whether this claim should be
19 dismissed depends on whether the covenants in the other employees' RSAs
20 were assignable to PNC. Accordingly, for the reasons discussed above,
21 the Court finds that the other RSAs were not assignable, and grants
22 Defendants' motions in this regard.

23 **D. Conclusion**

24 For the reasons stated above, the Court finds that there are no
25 genuine issues of material fact that would make summary judgment
26 improper. And because the RSA upon which PNC's breach of contract and

1 tortious interference with contract claims are predicated did not become
2 assigned to PNC upon its merger with National City, the Court grants Mr.
3 Thomas' and the Prime Defendants' motions for partial summary judgment
4 on these claims.

5 For the reasons discussed above and on the record, **IT IS HEREBY**
6 **ORDERED:**

7 1. Mr. Thomas' Motion for Partial Summary Judgment, **ECF No. 203**,
8 is **GRANTED**.

9 2. The Prime Lending Defendants' Motion for Partial Summary
10 Judgment, **ECF No. 204**, is **GRANTED**.

11 3. PNC's Motion for Leave to Conduct Discovery and for a
12 Continuance, **ECF No. 217**, is **DENIED**.

13 **DATED** this 5th day of March 2012.

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15 _____
16 S/ Edward F. Shea
17 EDWARD F. SHEA
18 United States District Judge

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